

CITATION: Capstack Advisory v. Northern Lights, 2023 ONSC 2934
COURT FILE NO.: CV-20-00643719-0000
DATE: 20230516

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: CAPSTACK ADVISORY SERVICES INC., Plaintiff

- and-

NORTHERN LIGHTS ENTERPRISE INC. AND AALTO DEVELOPMENT
INC., Defendants

BEFORE: Associate Justice Rappos

COUNSEL: *Khaled Gheddai*, for the Plaintiff

Bobby Sachdeva, for the Defendants

HEARD: May 15, 2023 (via videoconference)

ENDORSEMENT

Overview

[1] The plaintiff, Capstack Advisory Services Inc. (the “**Plaintiff**”), brings a motion for an order striking out the statement of defence of Northern Lights Enterprises Inc. and Aalto Development Inc. (collectively, the “**Defendants**”). The Plaintiff seeks this relief under rule 30.08(2)(b) due to the failure of the Defendants to serve an affidavit of documents.

[2] In the alternative, the Plaintiff requests an order, *inter alia*: (a) compelling the Defendants to serve a sworn affidavit of documents within 20 days; (b) compelling the Defendants to attend to be examined for discovery at a time and place fixed for the examination by the Plaintiff; and (c) imposing a discovery plan on the Defendants.

[3] The position of the Defendants is that the motion is premature and improper and should be dismissed. In the alternative, the Defendants request that the court grant an order: requiring the Plaintiff to deliver a further and better affidavit of documents within 45 days; (b) requiring the Defendants to deliver their affidavit of documents by July 31, 2023; and (c) requiring examinations for discovery to be completed by September 30, 2023.

[4] At the outset of the hearing, I noted to counsel that it appeared that they had failed to follow the Three C’s of cooperation, communication and common sense in how they have dealt

with the outstanding issues between the parties to date. Although the Three C's are the "principles of operation of the Commercial List" and referenced in the *Consolidated Practice Direction Concerning the Commercial List*, in my view they are equally applicable in civil proceedings. See *Rheaume v. Foster*, 2021 ONSC 5804, *Duggan v. Lakeridge*, 2017 ONSC 1474, and *Bosworth v. Coleman*, 2014 ONSC 6135.

[5] For the reasons set out below, the Plaintiff's motion for an order to strike the Defendants' statement of defence is dismissed, and a timetable shall be ordered for the parties to complete examinations for discovery.

Facts

[6] The Plaintiff commenced this proceeding by way of statement of claim issued on July 9, 2020. The Plaintiff alleges, *inter alia*, that the Defendants are liable on a joint and several basis for damages of \$600,000 in connection with an agreement entered into by the parties wherein the Plaintiff was engaged to assist the Defendants in securing debt and equity financing for the development of a mixed-use condominium building.

[7] The Defendants issued a statement of defence on October 14, 2020. The Plaintiffs issued a Reply dated November 2, 2020. As a result, pleadings have been closed in this proceeding for over 2.5 years.

[8] On December 21, 2020, the Plaintiff served its sworn affidavit of documents. Five months later on May 19, 2021, Plaintiff's counsel (Mr. Bakos) e-mailed counsel to the Defendants (Mr. Sachdeva) and asked when the Defendants would be serving their affidavit of documents. On that same day, Mr. Sachdeva replied that he would look into getting documents from his clients and would then commit to times for delivery of an affidavit of documents and productions. Mr. Sachdeva asked whether Mr. Bakos would be sending over a draft discovery plan.

[9] On June 1, 2021, Mr. Bakos e-mailed Mr. Sachdeva and asked him to provide a date by which her would serve the Defendants' affidavit of documents. Mr. Bakos confirmed that he would provide a draft discovery plan once he had a date for delivery of the Defendants' affidavit of documents. In his e-mail, Mr. Bakos requested a response from Mr. Sachdeva within 48 hours "failing which, my client has instructed me to bring a motion to compel delivery of your clients' affidavit of documents."

[10] On that same day, Mr. Sachdeva confirmed via e-mail that the Defendants' affidavit of documents would be served by July 5, 2021.

[11] On June 16, 2021, Mr. Sachdeva e-mailed Mr. Bakos and indicated that in his view, the Plaintiff's affidavit of documents was deficient in several respects. Mr. Sachdeva provided a detail listing of what he believed the deficiencies were in his e-mail. Mr. Sachdeva does not in his e-mail state that he would not be serving the Defendants' affidavit of documents in the face of the alleged deficiencies.

[12] As will be reflected further below, counsel to the Plaintiff never responded in writing to Mr. Sachdeva's listing of deficiencies.

[13] The Defendants did not serve their affidavit of documents on July 5, 2021, which was the date Mr. Sachdeva previously agreed to.

[14] There was no written communication between counsel until January 5, 2022, almost 6.5 months after Mr. Sachdeva's e-mail dated June 16, 2021. Mr. Bakos' e-mail to Mr. Sachdeva noted that the Defendants' affidavit of documents was due by July 5, 2021 and had not been served to date. Mr. Bakos requested that the affidavit of documents be served by January 14, 2022, failing which he had instructions to bring a motion to compel the delivery of the Defendants' affidavit of documents.

[15] Mr. Bakos' e-mail did not refer to Mr. Sachdeva's June 16, 2021 e-mail listing the alleged deficiencies in the Plaintiff's affidavit of documents.

[16] Mr. Sachdeva did not respond in writing to Mr. Bakos' e-mail.

[17] On November 28, 2022, almost 11 months later, Mr. Bakos' colleague, Mr. Gheddai, e-mailed Mr. Sachdeva and provided a draft discovery plan. The draft discovery plan required the Defendants to serve their affidavit of documents by December 23, 2022. Mr. Gheddai noted that, if they did not hear back from Mr. Sachdeva by December 5, 2022, they would bring a motion to compel delivery of the Defendants' affidavit of documents.

[18] Mr. Gheddai's e-mail did not refer to Mr. Sachdeva's June 16, 2021 e-mail listing the alleged deficiencies in the Plaintiff's affidavit of documents.

[19] On December 4, 2022, Mr. Sachdeva responded to Mr. Gheddai's e-mail and indicated that he would be happy to address the draft discovery plan and production of the Defendants' affidavit of documents, once the following two items were addressed: (a) the possibility of the Plaintiff posting security for costs, given the Defendants' understanding that the Plaintiff was no longer carrying on business; and (b) his e-mail dated June 16, 2021 listing the deficiencies in the Plaintiff's affidavit of documents. Mr. Sachdeva re-sent his June 16, 2021 e-mail to Mr. Gheddai at that time.

[20] Mr. Sachdeva noted that he was available to discuss the issues with counsel and provided his availability. He also noted that, if the Plaintiff wished to pursue a motion, a case conference would be a possible next step.

[21] Counsel to the Plaintiff did not respond until February 2, 2023, almost two months later. In an e-mail to Mr. Sachdeva, Mr. Gheddai disagreed with the contention that the Plaintiff was no longer in business and had no assets. With respect to the discovery plan, Mr. Gheddai attached it to the e-mail and again asked for comments. Mr. Gheddai reminded Mr. Sachdeva that he had agreed to deliver the Defendants' affidavit of documents by July 5, 2021. Mr. Gheddai again did not refer to the June 16, 2021 e-mail concerning the alleged deficiencies in the Plaintiff's affidavit of documents.

[22] In his e-mail, Mr. Gheddai asked Mr. Sachdeva to confirm available dates for a hearing of the Plaintiff's motion, in the event that the Defendants were not going to deliver their affidavit of documents or comment on the draft discovery plan.

[23] February 2, 2023 was the last day the parties communicated in writing regarding the motion, which was heard almost 3.5 months later.

Analysis

[24] The Plaintiff seeks an order striking the Defendants' statement of the defence. Rule 30.08(2)(b) provides that the court may strike out a statement of defence where the defendant has failed to serve an affidavit of documents.

[25] Rule 30.03(1) provides that every party to an action shall serve on every other party an affidavit of documents disclosing to the full extent of the party's knowledge, information and belief all documents relevant to any matter in issue in the action that are or have been in the party's possession, control or power.

[26] The Plaintiff cites the Court of Appeal's decision in *Falcon Lumber Limited v. 2480375 Ontario Inc. (GN Mouldings and Doors)*, 2020 ONCA 310 ("**Falcon Lumber**") as the binding authority that sets out the factors a court shall consider when determining whether to strike out a pleading under rule 30.08(2).

[27] In *Falcon Lumber*, the Court of Appeal noted at paragraph 9 of the decision that the motion judge struck out a statement of defence in circumstances where:

“(i) there had been 30 dates for motions, cross-motions, and case conferences; (ii) on most court attendances the primary issue had been the Lotey Defendants' failure to provide complete productions; (iii) 22 orders or judicial endorsements had been made; (iv) six court production orders had been made against the Lotey Defendants; and (v) as of the date of the motion, the Lotey Defendants still had not made full and complete production of relevant documents”.

[28] The motion judge had found that the defendants had “willfully disregarded court procedures and orders for three years; done everything in their power to avoid an adjudication on the merits; and done everything they could to prejudice Falcon Lumber's claim...” (*Falcon Lumber* at paragraph 38).

[29] The Court of Appeal dismissed the defendants' appeal of the motion judges' decision. In reaching its decision, the Court of Appeal noted that the scope of the remedy to strike a statement of defence is one within the discretion of the court, which is to be determined in the context of the particular case (*Falcon Lumber* at paragraph 49). The remedy is not restricted to “last resort” situations, although courts usually want to ensure that a party has a reasonable opportunity to cure its non-compliance before striking out its pleading (*Falcon Lumber* at paragraph 50).

[30] The Court of Appeal identified a number of “common sense factors” for courts to consider when deciding whether to strike out a pleading under rule 30.08, which include: (i) whether the party’s failure is deliberate or inadvertent; (ii) whether the failure is clear and unequivocal; (iii) whether the defaulting party can provide a reasonable explanation for its default, coupled with a credible commitment to cure the default quickly; (iv) whether the substance of the default is material or minimal; (v) the extent to which the party remains in default at the time of the request to strike out its pleading; and (vi) the impact of the default on the ability of the court to do justice in the particular case” (*Falcon Lumber* at paragraph 57).

[31] My decision on this motion is discretionary. Having reviewed the evidence before me and considered the factors set out in *Falcon Lumber*, I agree with the Defendants that the circumstances of this case do not warrant an order striking the Defendants’ statement of claim.

[32] While it is clear that the Defendants have failed to comply with their obligation to serve an affidavit of documents in accordance with rule 30.03, there is a reasonable explanation. After having reviewed the Plaintiff’s affidavit of documents, Mr. Sachdeva set out in detail what he believed to be a number of deficiencies in the affidavit in his e-mail to Mr. Bakos on June 16, 2021. Neither Mr. Bakos nor Mr. Gheddai responded to this e-mail, even when Mr. Sachdeva sent it to them again on December 4, 2022.

[33] In his December 4, 2022 e-mail, Mr. Sachdeva indicated that he was happy to discuss the proposed discovery plan, delivery of the Defendants’ affidavit of documents, and issues related to the alleged deficiencies in the Plaintiff’s affidavit of documents. Instead of taking Mr. Sachdeva up on this offer, counsel to the Defendants waited two months to send a response, and their response did not address any of the issues raised by Mr. Sachdeva and focused on scheduling this motion.

[34] Additionally, the context of how this matter has proceeded is important. The Plaintiff served its affidavit of documents on December 21, 2020. Mr. Bakos waited five months to follow up with Mr. Sachdeva. After the parties exchanged e-mails on June 1, 2021, Mr. Bakos waited seven more months to follow up with Mr. Sachdeva with an e-mail sent on January 5, 2022. The next e-mail sent by counsel to the Plaintiff was on November 28, 2022, almost 11 months later.

[35] While the Defendants are in default of their disclosure obligations, their failure is not the sole reason that “final adjudication of the case on its merits” has been delayed, and the factual matrix does not support the striking of the defence as a proportionate remedy in the circumstances.

[36] In terms of the alternative relief sought by the Plaintiff, both parties have suggested deadlines for a timetable for the completion of discoveries. Rule 30.08(c) provides me with the discretion to “make such other order as is just.”

[37] The Plaintiff requests that the Defendants serve their sworn affidavit of documents and their Schedule “A” productions within 20 days. The Defendants propose that the Plaintiff deliver a further and better affidavit of documents within 45 days, the Defendants deliver their affidavit

of documents by July 31, 2023, and examinations for discovery to be completed by September 20, 2023.

[38] Although it was addressed briefly during submissions, the Plaintiff has yet to respond to the deficiencies in its affidavit of documents raised by Mr. Sachdeva in his e-mail dated June 16, 2021. In my view, given the ongoing discovery obligations under rule 30.07, it is appropriate for the Plaintiff to first address Mr. Sachdeva's allegations and produce its Schedule "A" documents.

[39] As a result, the following timetable shall be adhered to by the parties:

- a) The Plaintiff shall, by June 6, 2023, either: (a) confirm in writing that, following a subsequent review, its affidavit of documents served December 21, 2020 is accurate and complete, and produce its Schedule "A" documents; or (b) serve a further and better affidavit of documents and produce its Schedule "A" documents.
- b) The Defendants shall, by July 7, 2023, serve their affidavit of documents and produce their Schedule "A" documents.
- c) Examinations for discoveries shall be completed by September 15, 2023.

Costs

[40] Both parties seek costs of this motion. The Plaintiff seeks costs on the basis that it was required to bring this motion to force the Defendants to compel with their discovery obligations. The Defendants seek costs on the basis that this motion should never had been brought.

[41] In my view, there is fault to be distributed to both parties. Almost two years has passed, and the Plaintiff never responded to the Defendants' list of deficiencies concerning the Plaintiff's affidavit of documents. The Defendants failed to adhere to their fundamental disclosure obligations and did not take any steps to bring a motion under rule 30.06 for an order compelling the Plaintiff to deliver a further and better affidavit of documents. The parties barely communicated with one another from June 1, 2021 to February 2, 2023.

[42] As noted above, in my view both parties failed to adhere to the Three C's of cooperation, communication and common sense. If they had communicated, cooperated and exercised common sense, this motion would never have been necessary.

[43] As a result, I am exercising my discretion under section 131 of the *Courts of Justice Act* and rule 57.01 to order that both parties bear their own costs of the motion.

Disposition

[44] For the foregoing reasons, I order as follows:

- a) the Plaintiff's motion to strike the Defendants' statement of defence is dismissed;
- b) the parties shall adhere to the timetable set out in paragraph 39 above; and
- c) the parties shall bear their own costs of the motion.

[45] Once the parties have agreed to a form of draft order, they may either upload it to CaseLines for my review or send it to Assistant Trial Coordinator Kimi Sharma.

Associate Justice Rappos

DATE: May 16, 2023